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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No.

ANHEUSER-BUSCH, INC.,

Petitioner,

v.

TEAMSTERS LOCAL NO. 633, NATIONAL CONFERENCE OF BREWERY AND SOFT DRINK WORKERS, SOCRATES MAKRIS, STEVEN J. McCULLOUGH, FRANK SEBAN,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

The Petitioner, Anheuser-Busch, Inc., hereby requests the issuance of an order granting certiorari to review the judgment and opinion of the United States Court of Appeals for the First Circuit entered in this proceeding on February 19, 1975, Petition for Rehearing denied March 24, 1975.

OPINIONS BELOW

The opinion of the Court of Appeals for the First Circuit, dated February 19, 1975, is reported at 76 CCH LC ¶10, 672 and is reprinted in Appendix hereto at page 1a, along with the unreported Memorandum and Order on the Petition for Rehearing dated March 24, 1975, at Appendix hereto, page 7a.

The decision of the United States District Court for the District of New Hampshire dated August 19, 1974, is reported at 75 CCH LC ¶10,406 and is reprinted in Appendix hereto at page 9a.

JURISDICTION

The Petitioner Employer filed a complaint under Title III, §301(a) of the Labor-Management Relations Act, 29 U.S.C. §185(a) (1970), seeking damages and an injunction restraining Respondents from engaging in concerted interference with normal operations in violation of the "no-strike" clause of the collective bargaining agreement between Petitioner and Respondent Union. The District Court granted a preliminary injunction on August 19, 1974. On appeal, the First Circuit on February 19, 1975 reversed the Order Granting Preliminary Injunction. Petitioner's Petition for Rehearing was denied on March 24, 1975. This Petition for Writ of Certiorari has been filed within 90 days from the entry of the First Circuit's denial of the Petition for Rehearing of March 24, 1975.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1) (1970).

QUESTIONS PRESENTED

1. Whether *Boys Markets v. Retail Clerks Union*, 398 U.S. 235 (1970), permits the issuance of an injunction against a labor organization so as to prohibit economic self-help in violation of a contractual no-strike clause where the union's objective is to coerce employer acceptance of the union's position in a labor dispute pending arbitration.

2. Whether it is appropriate for the District Court to analyze the basis of the arbitrable dispute as a pre-condition to enjoining a union's irreparably injurious economic self-help in violation of a contractual no-strike clause.

STATUTORY PROVISIONS INVOLVED

Section 7 of Norris-LaGuardia Act, 29 U.S.C. §107:

"No court of the United States shall have jurisdiction to issue a temporary or permanent injunction in any case involving or growing out of a labor dispute, as defined in this chapter, except after hearing the testimony of witnesses in open court (with opportunity for cross-examination) in support of the allegations of a complaint made under oath, and testimony in opposition thereto, if offered, and except after findings of fact by the court, to the effect–

"(a) That unlawful acts have been threatened and will be committed unless restrained or have been committed and will be continued unless restrained, but no injunction or temporary restraining order shall be issued on account of any threat or unlawful act excepting against the

person or persons, association, or organization making the threat or commiting the unlawful act or actually authorizing or ratifying the same after actual knowledge thereof;

"(b) That substantial and irreparable injury to complainant's property will follow;

"(c) That as to each item of relief granted greater injury will be inflicted upon complainant by the denial of relief than will be inflicted upon defendants by the granting of relief;

"(d) That complainant has no adequate remedy at law; and

"(e) That the public officers charged with the duty to protect complainant's property are unable or unwilling to furnish adequate protection."

Section 301(a) of Labor-Management Relations Act, 29 U.S.C. § 185(a):

"(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

STATEMENT OF THE CASE

Petitioner Anheuser-Busch, Inc. operates nine breweries located throughout the United States. The Petitioner has been party to established collective bargaining relationships with affiliates of the Inter-

national Brotherhood of Teamsters in their capacity as the collective bargaining representatives of Petitioner's employees. At each brewing facility there is in effect a collective bargaining agreement between the Petitioner and the Teamsters Union that contains a broad no-strike clause and an equally broad grievance-arbitration procedure.

At Petitioner's Merrimack, New Hampshire brewery, the situs of the labor dispute that underlies this litigation, the applicable collective bargaining agreement makes subject to the grievance-arbitration procedure:

> "any difference between the Company and the employee covered by this Agreement or between the Company and the Union as to the following:
>
> (a) Any matter relating to wages, hours of work, or working conditions covered by this Agreement; or
>
> (b) Any matter involving the meaning, interpretation, application or alleged violation of the Agreement by the Company." (Collective Bargaining Agreement, Article 8, Section 1.)

The contractual no-strike clause is equally broad. It provides:

> "There are to be no strikes, work stoppages, concerted interference with normal operations, or lockouts during the term of this Agreement." (Collective Bargaining Agreement, Article 33.)

The grievance-arbitration procedure is mandatory and binds both parties: "The Company and Union must resort to the use of the grievance procedure established herein" (Collective Bargaining Agreement, Article 8, Section 1). Under the procedure a grievance is processed through various steps requiring discussion by

company and union representatives; if the dispute is not resolved, it is subject to submission to an arbitrator whose decision is "final and conclusive on both the Company and the Union." (Collective Bargaining Agreement, Article 8, Section 2.)

The labor dispute that led to litigation and ultimately to this Petition arose from the company's enforcement of a work rule prohibiting the wearing of tank-top shirts.[1] There is no dispute that the company's authority to enforce the work rule is subject to the collective bargaining agreement's grievance-arbitration procedure. Nevertheless, the employees resisted its imposition, and within several days after the dispute arose, there was concerted, wholesale disobedience of the dress rule by the Merrimack brewery workforce. The Petitioner retained the work rule and, as a result of the consequential employee discipline, the brewery was effectively shut down.

The Petitioner-Employer continued to enforce the work rule, notwithstanding the concerted pressure by the employees and their collective bargaining representative to suspend its application, because members of the public are regularly given tours of the brewery in order that they might observe the brewing process. The company believed that the impression created by employees in tank-top shirts was inconsistent with its carefully cultivated corporate image of quality and cleanliness.

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[1] "A tank top shirt is an underwear shirt that leaves exposed the shoulders, arms and underarms of the wearer." District Court Opinion, at p. 10a *infra*.

At this juncture, Petitioner, faced with the dilemma of abandoning the work rule or sustaining a continued summertime shutdown of the brewery as a result of the employees' and union's concerted disobedience, filed a complaint in the United States District Court for the District of New Hampshire seeking injunctive and other relief to enforce the collective bargaining agreement's no-strike clause under Section 301(a) of the Labor-Management Relations Act of 1947, *as amended*, 29 U.S.C. §185(a) (1970).

Following a hearing on Petitioner's Prayer for Injunctive Relief, the District Court found that continuance of Respondent Union's conduct would cause irreparable injury to Petitioner and that an injunction was warranted under ordinary principles of equity. It also found that the matter was clearly one which the parties were bound to arbitrate under the collective bargaining agreement, and that the employer would suffer more from the denial of an injunction than would the union from its issuance. Citing the Supreme Court's decision in *Boys Markets, Inc. v. Retail Clerks Union*, 398 U.S. 235 (1970), the District Court enjoined the union from further disruption of Petitioner's normal operations. (p. 11a *infra*) On August 21, 1974, Respondents filed an appeal to the United States Court of Appeals for the First Circuit.

The Court of Appeals reversed the order of the District Court because "the limited incursion upon the Norris-LaGuardia Act which was authorized by *Boys Markets* is insufficient to support the injunction issued below." (p. 4a *infra*) Focusing on the nature of the rule, the Circuit Court was of the opinion that having some employees improperly attired "cannot be con-

sidered the type of injury properly providing basis for injunctive relief." (p. 5a *infra*)

REASONS FOR GRANTING THE WRIT

I. The Court of Appeals' decision creates a precedent that is inconsistent with *Boys Markets v. Retail Clerks* and which, if allowed to stand, will encourage disruptive economic self-help in direct abrogation of the union's no-strike commitment.

In *Boys Markets, supra,* the Court held that the Norris-LaGuardia Act does not bar the granting of injunctive relief against concerted activity where the collective bargaining agreement contains a mandatory grievance adjustment or arbitration procedure and a no-strike clause. *Id.* at 253, overruling *Sinclair Refining Co. v. Atkinson*, 370 U.S. 195 (1962). The Court's opinion in *Boys Markets, supra,* took cognizance of the strong national policy in favor of the peaceful settlement of labor disputes through arbitration. *Id.* at 241. *See, e.g., United Steelworkers of America v. American Manufacturing Co.*, 363 U.S. 564 (1960); *United Steelworkers of America v. Warrior and Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers of America v. Enterprise Wheel and Car Corporation*, 363 U.S. 593 (1960); *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957). The Court then noted that this policy was seriously undermined by the unavailability of the injunctive remedy, saying:

> "[A] no-strike obligation, express or implied, is the *quid pro quo* for an under-taking by the

> employer to submit grievance disputes to the process of arbitration. [citation omitted] Any incentive for employers to enter into such an arrangement is necessarily dissipated if the principal and most expeditious method by which the no-strike obligation can be enforced is eliminated. While it is of course true, as respondent contends, that other avenues of redress, such as an action for damages, would remain open to an aggrieved employer, an award of damages after a dispute has been settled is no substitute for an immediate halt to an illegal strike. . . .
>
> "Even if management is not encouraged by the unavailability of the injunction remedy to resist arbitration agreements, the fact remains that the effectiveness of such agreements would be greatly reduced if injunctive relief were withheld. Indeed, the very purpose of arbitration procedures is to provide a mechanism for the expeditious settlement of industrial disputes without resort to strikes, lockouts, or other self-help measures. This basic purpose is obviously largely undercut if there is no immediate, effective remedy for those very tactics that arbitration is designed to obviate." 398 U.S. at 248-49 (footnotes omitted).

The importance of the availability of injunctive relief to further the federal labor policy in favor of arbitration was recently reiterated by the Court in *Gateway Coal Co. v. United Mine Workers*, 414 U.S. 368 (1974) and in *William E. Arnold Co. v. Carpenters District Council*, 417 U.S. 12 (1974).

The Court's decisions in *Boys Markets* and *Gateway Coal* represent a judicial recognition of the evolution of the labor-management relationship and the national interest in avoiding disruptions in production in circumstances where the underlying dispute is subject to

a fair and equitable resolution through a mutually agreed upon grievance-arbitration procedure. The First Circuit's decision severely disrupts the delicate labor relations balance achieved by the Court in *Boys Markets v. Retail Clerks Union, supra,* because it permits the union to introduce disruptive self-help into what was mutually intended to be a peaceful procedure for settling grievances during the life of a collective bargaining agreement. The Court of Appeals' decision accomplishes this undesirable result by allowing the union to take economic action to force management to change its position in a labor dispute pending arbitration. The Court of Appeals decision held that disruptive economic self-help in violation of a no-strike clause was not enjoinable except in those rare circumstances where the employer is able to establish that pre-arbitration acquiescence in the union's position would cause the employer irreparable injury.

The economic self-help sanctioned by the Court of Appeals is as injurious to labor relations harmony as the economic self-help found to be unacceptable in *Boys Markets* and *Gateway Coal.* The only difference between this case and *Boys Markets* is the method used to violate the no-strike clause in the attempt to force the employer to concede to the union's grievance. In *Boys Markets* the union engaged in a work stoppage; in the present case it engineered a pattern of massive disobedience to the work rule. In each case the union's activity caused a shutdown of operations, was in abrogation of the no-strike clause, and was inconsistent with Congress' intention that labor disputes be resolved

peacefully rather than through economic warfare, however subtle.[2]

II. The Court of Appeals decision ignores the intention of the no-strike clause and the axiom of labor relations that an employee is required to "work now and grieve later."

Arbitration procedures and no-strike clauses were established for the very practical purpose of allowing the enterprise to continue to function in circumstances where labor and management have a dispute over the terms and conditions of employment. Through the widespread use of arbitration procedures a body of arbitral precedent has developed that is designed to maximize the possibility that disputes will, in fact, be settled without disruption. One of the central concepts developed by arbitrators to facilitate the peaceful resolution of employee grievances is that except in special circumstances an employee is required to "work now and grieve later." Indeed, one arbitrator has said:

> "No principle of labor relations is better established than what is known as 'work now–grieve

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[2] If allowed to stand, the decision of the court below will deal a serious blow to the efficacy of the labor arbitration as "the substitute for industrial strife". United Steelworkers of America v. Warrior and Gulf Navigation Co., 363 U.S. 574, 578 (1960). The no-strike pledge is meaningless if its equitable enforcement can be circumvented by the simple expedient of substituting concerted disobedience for formal strike action. The union's purpose is the same: to use economic self-help instead of the grievance procedure to force an employer to change a term or condition of employment.

> later'. The only exception is where the work involved threatens the health or safety of the employee." *Amalgamated Meatcutters*, 73-1 ARB ¶8169 (1973) (Ray, Arbitrator).

This principle is articulated in the no-strike provision which states that "there [is] to be no . . . concerted interference with normal operations . . . during the term of this Agreement." (Collective Bargaining Agreement, Article 33) Conceptually, it is as closely related to the no-strike clause as the no-strike obligation implied by the Supreme Court from the contractual commitment to submit disagreements to final and binding arbitration in *Gateway supra*, at 381. *See also Teamsters Local v. Lucas Flour Co.*, 369 U.S. 95 (1962). In both cases the employee—except where the work is a threat to health or safety—defers his right to concerted economic self-help in return for a grievance procedure wherein the employer agrees to delegate its managerial prerogative to a neutral third party. Both principles operate to allow the enterprise to function while the dispute is being resolved, and they are emanations of the national interest in transcending labor warfare in favor of the peaceful resolution of disputes during the life of a collective bargaining agreement.

The "work now and grieve later" principle means that an employee must obey orders even if he sincerely believes such orders violate the collective bargaining agreement. A contrary result—allowing the union or employees themselves to determine the validity of work rules and supervisors' orders—would result in serious industrial disruption. *See Teamsters Local v. Lucas Flour Co., supra* at 105; *Gateway Coal v. United Mine Workers, supra* at 381. The authority for directing the

manner of production would be shifted from the employer, who must bear the consequences of late or improper manufacture, to the employees. Justice Arthur Goldberg, when he was General Counsel for the United Steel Workers of America and Special Counsel for the AFL-CIO, wrote:

> "The right to direct, where it involves wages, hours or working conditions, is a procedural right. It does not imply some right over and above labor's right. It is a recognition of the fact that somebody must be boss; somebody has to run the plant. People can't be wandering around at loose ends, each deciding what to do next. Management decides what the employee is to do. However, this right to direct or to initiate action does not imply a second-class role for the union. The union has the right to pursue its role of representing the interest of the employee with the same stature accorded it as is accorded management. To assure order, there is a clear procedural line drawn: the company directs and the union grieves when it objects.
>
> * * * *
>
> In addition to these exclusive rights to do things without any union say, the exclusive rights to manage and direct should be very clearly understood by all parties. The union cannot direct its members to their work stations or work assignments. The union does not tell people to go home because there is no work. The union does not notify people who are discharged to stay put. The union does not tell employees to report for work after a layoff (except perhaps as an agent for transmitting information in behalf of management). The union does not start or stop operations unless perhaps some urgent safety matter is involved and there is some contractual or other basis for such action.

This is not an easy concept. Very often union men are disturbed by decisions they consider entirely wrong. Nevertheless, a company's right to make its own judgments is clear.

But the union has rights too; the worker has rights. In fact, the union has the duty and as a union man the employee has the duty as well as the right to challenge the company's acts when they violate the workers' rights. That challenge is made through the grievance procedure, not through rebellion. . . ." Goldberg, "Management's Reserved Rights—a Labor View," *Management Rights and the Arbitration Process* (Washington: BNA Incorporated, 1956), pp. 120-121, 123-125.

Equitable enforcement of the "work now grieve later" application of the no-strike clause is crucial to peaceful labor relations. Its importance is illustrated by the facts of the instant case. The Petitioner enforced a rule that it believed to be important to the success of its enterprise. The employees and their union resisted enforcement, but rather than merely grieving the rule, they attempted unilaterally to force its rescission by concerted disobedience in violation of the no-strike clause. The employer was faced with the dilemma of capitulating or sustaining a shutdown of operations. That such a result is not contemplated in the normal labor arbitration setting is clear. As one arbitrator has said:

"An employee, by his refusal to perform an ordered task in order to correct what he believes is improper or a contractual violation, is in fact engaging in self-help. Such activity is to be abhorred since it eliminates the peaceful resolution of disputes and thereby destroys the effectiveness of the Grievance Procedure which results in

industrial anarchy in the plant." *Allied Metals Co.*, 71-1 ARB ¶8266 (1971) (Kabaker, Arbitrator).

The underlying rationale of the work now – grieve later principle was concisely stated by noted Arbitrator Harry Shulman as follows:

> "When a controversy arises, production cannot wait for exhaustion of the grievance procedure. While that procedure is being pursued, production must go on. And someone must have the authority to direct the manner in which it is to go on until the controversy is settled. That authority is vested in supervision. It must be vested there because the responsibility for production is also vested there; and responsibility must be accompanied by authority. It is fairly vested there because the grievance procedure is capable of adequately recompensing employees for abuse of authority by supervision." Ford Motor Co., 3 LA 779, 781 (1944).[3]

Obedience to the rule pending arbitration certainly would not have endangered the employees. Ironically, several brewery workers sought to wear tank shirts in a work area where the temperature was between 35° and 40°. (see p. 11a, *infra*) Rather, the concerted disobedience, which was encouraged, instigated and

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[3]*See also* Pacific Southwest Airlines, 62 LA 1189 (1974) (Gentile, Arbitrator); Dayton Suregrip & Shore Co., 74-1 ARB ¶8033 (1973) (Kabaker, Arbitrator); Amalgamated Meat Cutters, 73-1 ARB ¶8169 (1973) (Ray, Arbitrator); City of Detroit, 61 LA 645 (1973) (McCormick, Arbitrator); Allied Metals Co., 71-1 ARB. ¶8266 (1971) (Kabaker, Arbitrator); Union Carbide Corp., 71-1 ARB. ¶8286 (1971) (France, Arbitrator). *See generally* F. Elkouri & E. Elkouri, *How Arbitration Works* 154-59 & n.202 (3d ed. 1974).

acquiesced in by the union, was a raw exercise of economic leverage in violation of the no-strike clause and the entire structure of the grievance procedure.

The result in this case is no different and no less serious than the circumstances that led to the issuance of the injunction in *Boys Markets* and *Gateway Coal*. In *Boys Markets* the petitioner had only to allow bargaining unit employees to unload and reload a freezer in order to avert a strike, 398 U.S. at 239. Clearly, the employer would suffer no irreparable harm if it had capitulated to the union's demands, yet the Supreme Court found that the District Court's finding that "by reason of respondent's *violations* of its no-strike obligation, petitioner 'has suffered irreparable injury and will continue to suffer irreparable injury' " was sufficient to support an injunction. *Id.* at 254 (Emphasis Added). Likewise, in *Gateway Coal*, the employer would not have suffered irreparable harm had it acquiesced in the union's demand to suspend two foremen; yet the Supreme Court found that the injunction was properly issued. 414 U.S. at 387.

The First Circuit's interpretation of *Boys Markets* seriously undercuts the salutory effect that case has had upon the use of arbitration in the peaceful settlement of labor disputes and resurrects the problems of *Sinclair Oil v. Atkinson, supra,* which the Supreme Court had effectively laid to rest. Therefore, the Court should grant the Writ of Certiorari in order to cure this error.

III. The Petitioner's request for an injunction clearly met the *Boys Markets'* standards.

In *Boys Markets* the Supreme Court adopted the following principles, set forth in Justice Brennan's dissent in *Sinclair Refining Co. v. Atkinson*, 370 U.S. 195, 228 (1962):

> "A District Court entertaining an action under § 301 may not grant injunctive relief against concerted activity unless and until it decides that the case is one in which an injunction would be appropriate despite the Norris-LaGuardia Act. When a strike is sought to be enjoined because it is over a grievance which both parties are contractually bound to arbitrate, the District Court may issue no injunctive order until it first holds that the contract *does* have that effect; and the employer should be ordered to arbitrate, as a condition of his obtaining an injunction against the strike. Beyond this, the District Court must, of course, consider whether issuance of an injunction would be warranted under ordinary principles of equity—whether breaches are occurring and will continue, or have been threatened and will be committed; whether they have caused or will cause irreparable injury to the employer; and whether the employer will suffer more from the denial of an injunction than will the union from its issuance." (Emphasis in original) *See* 398 U.S. at 249.

The District Court below made all the findings required. (*See* p. 11a, *infra*) Specifically with regard to irreparable harm, the District Court found:

> "I find, therefore, that continuance of this dispute will cause irreparable injury to the plaintiff and

> that an injunction is warranted under ordinary principles of equity. Although no strike has been called or threatened, the plant has been shut down just as effectively as if all of the employees were on strike and picketing the plant." (p. 11a, *infra*)

The Court of Appeals did not dispute the finding that the closing of the plant had caused irreparable harm. Rather, focusing on the nature of the underlying dispute, the Court said that having some employees violate the dress rule "even during the summer when there are likely to be more than the usual number of persons touring the plant, cannot be considered the type of injury properly providing a basis for injunctive relief." (p. 5a, *infra*) Petitioner respectfully asserts that the Court of Appeals erred by examining the basis of the labor dispute and by shifting the focus on the inquiry concerning irreparable harm from the effects of the employees' concerted disobedience in violation of the no-strike clause to management's need to enforce the work rule pending arbitration. The employer was not required to establish that irreparable harm would result from employer acquiescence in union demands in *Boys Markets* and *Gateway Coal Company*, and the plain language of those cases shows no such inquiry was contemplated.

Justice Brennan's test quoted *supra* clearly indicates that the District Court should look to the harm caused by the breach of contract, "whether *they* have caused or will cause irreparable injury to the employer." 370 U.S. at 228 (Emphasis Added). The only plural noun serving as an antecedent to the pronoun "they" is the word "breaches" in the immediately previous clause. Similarly, in *Gateway Coal Co. v. United Mine Workers*,

supra, the Supreme Court adopted the District Court's findings that "the union's continued *breach* of its no-strike obligation would cause irreparable harm to the petitioner." *Id.* at 387 (Emphasis Added). Thus the District Court correctly focused on the harm caused by the breach of the no-strike clause.

The breach in this case is the union's interference with normal operations by its concerted refusal to obey work rules rather than submit its dispute to the contractual grievance and arbitration procedures. Although the First Circuit was of the opinion that the shutdown may have been caused by the employer's choice of disciplinary methods for "minor infractions", no effective alternative means of enforcing the work rule was available. Employees were warned that non-compliance with the rule meant loss of work opportunity and discipline. Petitioner's only real alternative would have been to capitulate to the union's coercive tactics and abandon any attempt to enforce its work rule.

The Petitioner met the standards announced by the Court in *Boys Markets*. The Court of Appeals decision vacating the injunction warrants review because it misconstrues the intention of *Boys Markets* by permitting union economic action in violation of a no-strike clause; and by requiring an employer to establish that it would be irreparably injured by capitulating to the union's demands as a precondition to an injunction prohibiting continued violation of the no-strike clause.

CONCLUSION

For these various reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

United States Court of Appeals
For the First Circuit

No. 74-1291

ANHEUSER-BUSCH, INC.,
PLAINTIFF, APPELLEE,

v.

TEAMSTERS LOCAL NO. 633,
NATIONAL CONFERENCE OF
BREWERY AND SOFT DRINK WORKERS,
SOCRATES MAKPIS, STEVEN J. McCULLOUGH,
FRANK SEBAN,
DEFENDANTS, APPELLANTS.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

Before Coffin, *Chief Judge*,
Aldrich and Campbell, *Circuit Judges*.

I. Philip Sipser, with whom *Sipser, Weinstock, Harper & Dorin* and *Nixon, Christy & Tessier* were on brief, for appellants.

John J. Delaney, Jr., with whom *William T. Sherry, Jr., Nutter, McClennen & Fish, William L. Phinney, Sheehan, Phinney, Bass & Green, Charles P. O'Conner*, and *Morgan, Lewis & Bockius* were on brief, for appellee.

February 19, 1975

COFFIN, *Chief Judge*. This tempest has been brewed in a very small teapot. The dispute which precipitated the filing in this court of more than 80 pages of briefs and an extensive appendix began on July 30, 1974, when appellee Anheuser-Busch posted a notice prohibiting employees at its Merrimack, New Hampshire brewery from wearing tank-top shirts on the job. Tank-tops are sleeveless shirts which

leave exposed the shoulders, arms and underarms of the wearer. Beginning on July 31, when three employees were sent home after refusing to doff their tank-tops for other shirts, the emotional temperature rose, with over a dozen more employees, including shop stewards, being sent home a few days later. The issue peaked by August 14, when thirteen of the eighteen employees in the Brewing Department wore tank-tops, refused to put on other shirts, and went home. Approximately thirty employees in the Maintenance Department wore tank-tops on August 15. On August 16 no maintenance employees reported for work and production at the brewery was halted.

On August 14 appellee filed a complaint seeking injunctive relief and damages[1] for what it alleged were violations of the collective bargaining agreement then in force. Labor Management Relations Act § 301(a), 29 U.S.C. § 185(a). After an August 16 hearing, the district court enjoined appellants from encouraging or participating in any concerted interference with brewery operations. By the specific terms of the injunction, employees were permitted to wear tank-tops only if working in areas of the plant where they were not subject to view by those members of the public or special groups touring the brewery.[2] Although the hearing was directed at the question of whether a temporary restraining order should issue, when it became clear that neither party intended to introduce additional evidence, the district court ruled that the order issued "was and is a preliminary injunction".

There are several difficult issues, raised by the parties in their briefs, which might require discussion and decision if

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[1] Defendants, herein referred to as appellants, were Teamsters Local No. 633, the National Conference of Brewery and Soft Drink Workers, and three union officers.

[2] Appellee objects to tank-tops on the ground that an unsightly appearance is presented by employees to the many persons touring the brewery.

this were a different case. The district court held that an injunction could be entered against the unions despite the Norris-LaGuardia Act, 29 U.S.C. §§ 101 *et seq.*, because of the Supreme Court's decision in *Boys Markets, Inc.* v. *Retail Clerks Union, Local 770*, 398 U.S. 235 (1970). It is true that strikes and work stoppages are proscribed by the collective bargaining agreement between the parties, but that does not settle the question of the applicability of the *Boys Markets* doctrine, for the plant's shutdown might be viewed as attributable to the employer's choice of disciplinary methods rather than to the employees' failure to conform to the dress code. Other issues raised that need not be addressed here include the possible application of the requirements of the Norris-LaGuardia Act in a case where the *Boys Markets* exception is available and the suggestion that the employees' actions here were individual, not concerted.

This case may be resolved by reference to the ordinary principles governing equitable relief — principles which, the *Boys Markets* Court made clear, are to be applied where a labor injunction is sought:

> ". . . the District Court must . . . consider whether issuance of an injunction would be warranted under ordinary principles of equity — whether breaches are occurring and will continue, or have been threatened and will be committed; whether they have caused or will cause irreparable injury to the employer; and whether the employer will suffer more from the denial of an injunction than will the union from its issuance." 398 U.S. at 254, quoting *Sinclair Refining Co.* v. *Atkinson*, 370 U.S. 195, 228 (1962) (Brennan, J., dissenting).

The district court's findings on the question of injury were brief: "I take judicial notice of the fact that the general public's desire for beer, while a year-round phenomenon, is more acute in the summer. I find, therefore, that continu-

ance of this dispute will cause irreparable injury to the plaintiff and that an injunction is warranted under ordinary principles of equity. Although no strike has been called or threatened, the plant has been shut down just as effectively as if all of the employees were on strike and picketing the plant."

Even though the decision to grant or deny preliminary injunctive relief is one within the discretion of the district court, 11 C. Wright & A. Miller, Federal Practice and Procedure § 2948 (1973), we conclude that the limited incursion upon the Norris-LaGuardia Act which was authorized by *Boys Markets* is insufficient to support the injunction issued below. Although the district court's findings on injury make reference to the fact that the plant was effectively shut down, an employer cannot be permitted to qualify for injunctive relief simply by responding to minor employee infractions in a way that brings serious and irreparable damage upon himself by causing a shutdown. That is what happened here. As the district court noted, "the real controversy is whether the employees shall be allowed to wear tank-top shirts pending submission of the agreement to arbitration."

Viewed from this perspective, the appellee's expected injury cannot be said to be either irreparable or one which outweighs the loss which the union was likely to suffer through the issuance of an injunction. *Detroit Newspaper Publishers Ass'n* v. *Detroit Typographical Union No. 18*, 471 F.2d 872 (6th Cir. 1972), *cert. denied*, 411 U.S. 967 (1973), is persuasive authority. In that case, a district court enjoined an employer, pending arbitration, from utilizing certain electronic editing equipment unless it was operated by employees represented by the plaintiff union. The court of appeals reversed. The lower court had not weighed the equities between the parties, and the employees'

probable loss of overtime pending arbitration was found not to qualify as irreparable injury. Having some employees wear tank-tops, even during the summer when there are likely to be more than the usual number of persons touring the plant, cannot be considered the type of injury properly providing a basis for injunctive relief.

Our holding here should not be taken as one that an employer will never be successful in demonstrating that he will be seriously or irreparably harmed if prevented from effectively enforcing a work rule pending arbitration. Refusal by employees to comply with a mandated safety precaution might well stand on a different footing. *See United Steelworkers* v. *Blaw-Knox Foundry & Mill Mach. Inc.*, 319 F. Supp. 636, 640-41 (W.D. Pa. 1970). Or, in another case, there might be an adequate showing that employee disregard of work rules was seriously undermining an employer's ability to conduct his business. Here, however, there has been on the employer's part nothing more than the undifferentiated claim that there exists a right to make and enforce rules pending the outcome of a grievance and arbitration procedure, and we reject the contention that the labor injunction is available in the ordinary course of events as an enforcement mechanism. *See Detroit Newspaper Publishers Ass'n* v. *Detroit Typographical Union No. 18, supra* (rejecting argument that, absent unusual circumstances, a party's appearance of powerlessness due to failure to prevent opposing party's unilateral action pending arbitration constitutes irreparable injury). We hold merely that in this case there was not a showing of potential injury adequate to support relief under general equitable principles. *See Detroit Newspaper Publishers Ass'n* v. *Detroit Typographical Union No. 18, supra; North American Coal Corp.* v. *Local Union 2262*, 497 F.2d 459 (6th Cir. 1974); *Pittsburgh Newspaper Printing Pressmen's Union No. 9* v. *Pittsburgh*

Press Co., 479 F.2d 607 (3d Cir. 1973).

We are mindful of the repeated concessions of both parties that the underlying dispute on the wearing of tank-tops is an arbitrable one, and therefore find it unnecessary to incorporate in this court's judgment a direction that the district court order the parties to proceed to arbitration. Either party may return to the district court on that issue if that proves necessary.

Reversed.

Adm. Office, U. S. Courts — Thayer-Dearing Company Legal Printers Boston

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 74-1291

RECEIVED
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ANHEUSER-BUSCH, INC.,
Plaintiff, Appellee,

v.

TEAMSTERS LOCAL NO. 633, NATIONAL CONFERENCE OF BREWERY AND SOFT DRINK WORKERS, SOCRATES MAKPIS, STEVEN J. McCULLOUGH, FRANK SEBAN,
Defendants, Appellants.

On Petition for Rehearing
MEMORANDUM AND ORDER
Entered March 24, 1975
Before Coffin, *Chief Judge*,
Aldrich and Campbell, *Circuit Judges*.

Petitioner's petition for rehearing, in addition to rearguing issues previously thoroughly presented, charges that our decision improperly involved weighing the merits of its work rule barring the wearing of tank-top shirts. We held simply that irreparable harm, a

prerequisite for an injunction, had not been demonstrated. The merits of the dress requirement–e.g., whether it is within management's proper sphere of power or not–are for the arbitrator. Our "weighing" consisted only in rejecting the company's contention that "management prerogative" includes an entitlement to the assistance of federal injunctive relief in enforcing all work rules pending arbitration. Were we to accept petitioner's theory, the *Boys Markets* invocation of equitable principles could always be bypassed. We found this implication of petitioner's theory to be unacceptable, rejected the proffered theory in our opinion, and continue to adhere to that disposition.

As for the requested stay of mandate, while we do not order mandate to issue forthwith, we see no reason to depart from normal course.

Petition for rehearing denied.

By the Court:

/s/ DANA H. GALLOP
Clerk

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF NEW HAMPSHIRE

NO. 74-238

ANHEUSER-BUSCH, INC.,

Plaintiff

v.

TEAMSTERS, LOCAL 663,

Defendants

RULING AND ORDER ON PLAINTIFF'S PETITION FOR TEMPORARY RESTRAINING ORDER ENTERED AUGUST 19, 1974

BOWNES, D. J.: The complaint in this action has been brought pursuant to section 301 of the Labor Management Relations Act of 1947, as amended. 29 U. S. C. § 185, seeking damages and injunctive relief on the grounds that certain actions of the defendants are in violation of a collective bargaining agreement between the plaintiff and Teamsters Local No. 633 and the National Conference of Brewery and Soft Drink Workers.

There was a hearing on the petition for temporary restraining order on August 16th. It must be stated in all fairness that, for several hours prior to the hearing, counsel for Local No. 633, counsel for the plaintiff, and the court, endeavored to work out in good faith a settlement of the matter. After an agreement had been tentatively worked out between those present, counsel for Local No. 633 was advised by telephone by others not present that certain conditions, which were totally unacceptable to the plaintiff, had to be made a part of the agreement. This ended the settlement negotiations.

While the legal issue in this case is whether or not the defendants are in violation of the Collective Bargaining Agreement, the real controversy is whether the employees shall be allowed to wear tank-top shirts pending submission of the dispute to arbitration. The attorneys for the plaintiff and the attorney for Teamsters Local No. 633 have both stated that their respective clients want to get the tank-top shirt issue submitted to arbitration and decided as soon as possible.

The Facts

[Tank-Top Ban]

On July 25th, Paul W. Charrier, Manager of Industrial Relations for the plaintiff, posted a notice prohibiting employees from wearing "cloth covered shoes, sandals, and shorts." Exhibit 1. On July 30th, this notice was expanded to prohibit "brief tops, such as tank tops and body shirts." Exhibit 1. On July 30th, Mr. Charrier spoke to various employees relative to dress and asked them to refrain from wearing tank-top shirts. As I understand it, a tank-top shirt is an underwear shirt that leaves exposed the shoulders, arms, and underarms of the wearer. Tank-tops come in various colors and some have decorations. On the morning of July 31st three employees, one of whom Mr. Charrier had spoken to the day before, reported to work in tank-top shirts. They were told to wear a shirt over the tank-top and when they refused to do so, they were told to go home. The Business Agent of the Union, Steven J. McCullough, was notified and a meeting was held that afternoon with three other employees and the shop steward. These employees put shirts on after the meeting and returned to work. On August 1st, Mr. McCullough called Mr. Charrier and asked for a step #2 grievance meeting. He arrived about 2:00 P. M. for the meeting with Mr. Charrier accompanied by Socrates Makris, Secretary-Treasurer of Local 633. The testimony of Mr. Charrier and Mr. McCullough, the only two witnesses at the hearing, differs as to the tenor of Mr. Makris' remarks during this discussion. Mr. Charrier interpreted Mr. Makris' remarks as a threat to order, or at least induce, all of the employees to wear tank-top shirts. Mr. McCullough's appraisal of the remarks was that Mr. Makris was asking hypothetical questions. Both McCullough and Charrier agreed that the step #2 grievance meeting accomplished nothing. Mr. Charrier informed Mr. Makris that if the employees insisted on wearing tank-top shirts, they would have to go home.

The objection of the plaintiff to employees wearing tank-top shirts is that the public is conducted regularly through the plaintiff's plant in Merrimack, New Hampshire, and that some of the employees are not in the type of physical condition that would make tank-tops attractive. It must be noted here that the product manufactured and sold by the plaintiff has never been known to have a slimming effect on the human body.

On August 1, 1974, plaintiff sent a telegram to Mr. Makris, with copies to Mr. McCullough, and Mr. Frank Seban, Secretary-Treasurer of the National Conference of Brewery and Soft Drink Workers, stating in effect that it was the plaintiff's opinion that Mr. Markis' statements at the meeting violated the Collective Bargaining Agreement, specifically the grievance procedure provisions. The telegram also stated that Mr. Makris would be held responsible for any financial loss to the plaintiff. Exhibit 4. On August 2nd, the early loaders who reported for work at 6:00 A. M. were properly attired. The other employees who reported for work at 7:00 A. M. were also properly dressed. At 7:30 A. M. one of the stewards, Bouffard, reported to his station with a tank-top shirt. He refused to put a shirt over it and went home. At 7:40 A. M. another steward, Gordon, removed his shirt and wore only a tank-top. He refused to put the shirt back on and was sent home. At 8:00 A. M. eight other employees removed their shirts and reported to work with only tank-tops on. At 8:15 A. M. three other employees took their shirts off, exposing tank-tops and went home after refusing to put the shirts back on. At 8:15 A. M. three other employees took their shirts off and went home after being told to put them on. At about the same time, another employee reported to work only in a tank-top, refused to put a shirt over it, and was sent home. Another employee did the same thing in the afternoon with the same result.

[Suspensions]

The plaintiff informed the stewards that it was its intent to suspend them for two days. The other employees were suspended for two days. Mr. McCullough and Mr. Makris were kept informed of and knew of all of these facts. The company has never been notified whether these actions were authorized by the Union nor have they been told that they were not authorized. On Saturday, August 3rd, four more employees reported with tank-tops on and went home after refusing to put shirts over them. Another employee did the same thing on August 4th. On August 14th, all but five out of the eighteen employees who work in the Brewing Department reported for work with only tank-tops on. They went home after refusing to put shirts on. On August 15th, twenty-four employees in

the Maintenance Department reported for work with tank-top shirts and went home after refusing to put shirts over them. Later that afternoon, four or five other Maintenance employees took their shirts off and refused to put them on again. No Maintenance employees came to work at all on August 16th, and production has been halted as of Friday, August 16th. In most of the Brewing Department, the temperature ranges from 35° to 45° and, normally, employees have to wear warm clothing. It is both cold and damp in the Brewery cellars.

Mr. McCullough's testimony can be summarized as follows: Tank-tops have been worn by ten or twelve employees daily for three years. It is very warm in the Packaging and Shipping Department, and it is not air-conditioned. While the Brewery cellars do have a temperature of between 35° and 45°, the rest of the Brewery is warm. As Business Manager of the Union, he was first notified on July 31st that three employees had been suspended. There was no discussion with the Union prior to the suspension. He never ordered or suggested that employees either wear or not wear tank-tops, and Mr. Makris never ordered or suggested that employees either wear or not wear tank-tops.

There is no specific provision in the Collective Bargaining Agreement relative to tank-tops or any kind of clothing that is prohibited. The pamphlet entitled "General Conduct Rules and Safety Regulations" does not specifically refer to tank-tops. The paragraph on wearing apparel provides:

> Loose fitting, torn, or ragged clothing, neckwear, or gloves must not be worn around moving machinery and conveyors.

Rulings

It is clear that the tank-top issue has become a matter of principle for both parties. I do not know whether the desire to wear tank-tops is just another example of the desire for freedom of expression in clothes and personal effects that is manifest throughout the country today, or whether it has its roots in a deep-seated conflict between the employer and the Union. The fact of the matter is that the plaintiff's plant has been shut down because of the plaintiff's refusal to allow its employees to wear tank-tops and the employees adamant insistence on wearing them even at the cost of suspension and loss of pay. I take judicial notice of the fact that the general public's desire for beer, while a year-round phenomenon, is more acute in the summer. I find, therefore, that continuance of this dispute will cause irreparable injury to the plaintiff and that an injunction is warranted under ordinary principles of equity. Although no strike has been called or threatened, the plant has been shut down just as effectively as if all of the employees were on strike and picketing the plant.

[Arbitrability]

Both parties agree that the matter should be and will be submitted to arbitration just as soon as possible. I find that this case is one in which an injunction would be appropriate despite the Norris-LaGuardia Act. It is clear that the grievance is one which both parties are contractually bound to arbitrate. I find that the employer will suffer more from the denial of an injunction than will the Union from its issuance. *Boys Markets, Inc. v. Retail Clerks Union, Local 770*, [52 LC ¶ 10,902] 398 U. S. 235 (1970).

Wherefore, It Is Ordered:

1. That Teamsters Local 633, National Conference of Brewery and Soft Drink Workers, Socrates Makris, Steven J. McCullough, Frank Seban, each of them, their officers, agents, members, servants, employees, and any and all persons acting in concert with any of them are strictly restrained and enjoined from continuing, encouraging, recommending, urging, advising, inducing, inciting, aiding, abetting, or otherwise participating in any concerted interference with Plaintiff's normal operations.

2. That the plaintiff and the defendant Unions proceed to arbitration just as expeditiously and quickly as possible, if the matter cannot be settled by the so-called third step in the grievance procedure within the next twenty-four hours.

3. Pending an arbitration decision or grievance settlement of the matter in dispute, it is ordered that those workers who do not work at times or in places where they are subject to view by the general public touring the plant shall be allowed to wear tank-top shirts. Those workers who work in areas at times where they are subject to view by the general public during tours or subject to view by special groups on tours shall not wear tank-top shirts. Provided, further, that if those workers wearing tank-top shirts should for any reason have to go into an area where they are subject to a view of the

general public or special tour groups, they shall put on some other type of covering for the upper body for such time as they are subject to public view.

4. This order shall remain in effect pending a hearing on the merits or further order of the court.

So ordered.

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[1] As usual, the issue of the validity of the representation proceeding order comes before us in the context of a subsequent unfair labor practice case in which, in 1973, the Board held Denton guilty of refusal to bargain with Service Employees Local 623, AFL-CIO, the duly elected and certified representative of the unit. See 203 NLRB No. 172, 83 L. R. R. M. 1294, summarized in 1973 CCH NLRB ¶ 25,421 (June 1, 1973).

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IN THE

Supreme Court of the United States

October Term, 1974

No.

ANHEUSER-BUSCH, INC.,

Petitioner,

v.

TEAMSTERS LOCAL NO. 633, NATIONAL CONFERENCE OF BREWERY AND SOFT DRINK WORKERS, SOCRATES MAKRIS, STEVEN J. MCCULLOUGH, FRANK SEBAN,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Respondents Teamsters Local No. 633 ("Local 633"), National Conference of Brewery and Soft Drink Workers, Socrates Makris, Steven J. McCullough, and Frank Seban, submit this brief in opposition to the petition for a Writ of Certiorari filed by Anheuser-Busch, Inc. ("the Company").

Questions Presented

1. Did the Court of Appeals properly rule that an employer does not qualify for injunctive relief when in response to infractions of its rules by certain employees, it engages in self-help rather than arbitrate the disputed issue?

2. Did the Court of Appeals properly rule that ordinary rules of equity must apply on the employer's application for an injunction, and that its failure to demonstrate any irreparable injury must result in a denial of its application?

Statement of the Case

"This tempest has been brewed in a very small teapot." This opening sentence of the opinion of the Court of Appeals perhaps best summarizes the stature of this dispute. Certainly, this is not a case which merits the intervention of the Supreme Court. The case involves neither an important question of federal law, nor as the argument below will demonstrate, is the decision of the Court of Appeals in conflict with a decision of any other Court of Appeals or of the Supreme Court.

Statement of Facts

The Company's brief omits the following material facts.

For some three years prior to the dispute, the Company's employees at its Merrimack, New Hampshire brewery had been wearing tank-top shirts. Tank-top shirts are sleeveless and leave the wearer's arms exposed.

On July 30, 1974, during the mid-term of the collective bargaining agreement between respondent Local 633 and the Company, the Company posted a notice that it would thenceforth ban the wearing of tank-tops at the plant. At no time prior to the posting of the notice did the Company advise the Union of the ban or offer to discuss the matter with it.

On July 30 and in the ensuing few days, a number of employees reported to work wearing tank tops. Rather

than resort to the grievance and arbitration provision of the parties' contract, the Company sent the employees home and suspended them. The result was that the Company caused interference with its own operations. The Company then, on August 14, 1974, went to the District Court to enjoin the employees from wearing tank tops and to secure relief from its self imposed disruption of its operations. The District Court improvidently issued a preliminary injunction. The Court of Appeals for the First Circuit, reversed.

The Decision of the Court of Appeals

The Circuit Court, in a well-reasoned opinion found that the limited incursion upon the Norris-LaGuardia Act permitted by the Supreme Court in *Boys Markets, Inc.* v. *Retail Clerks Union Local 770,* 398 U.S. 235 (1970), could not support the injunction issued below. The Circuit Court held that an employer "cannot be permitted to qualify for injunctive relief simply by responding to minor employee infractions in a way that brings serious and irreparable damage upon himself by causing a shutdown" as happened here.

The Court of Appeals then found, as did the District Court, that the real controversy was "whether the employees shall be allowed to wear tank-top shirts pending submission of the dispute to arbitration". From this perspective, the Circuit Court properly ruled that an injunction was not warranted as "the appellee's expected injury cannot be said to be irreparable or one which outweighs the loss which the Union was likely to suffer through the issuance of an injunction".

wanted its plant to operate with a full complement of employees, all it need have done, was to permit its employees to return, and arbitrate the issue (i.e. "work now, grieve later," as the Company advocates in its petition herein).

B. The Requirement That Ordinary Principles Of Equity Apply In Any Application For An Injunction Is Fully Consistent With Boys Markets.

The Court of Appeals' reliance on ordinary principles of equity is fully in accord with the decision in *Boys Markets.* That decision reads:

> "Nor does it follow from what we have said that injunctive relief is appropriate as a matter of course in every case of a strike over an arbitrable grievance. . . . '[T]he Distict Court must . . . consider whether issuance of an injunction would be warranted under ordinary principles of equity. . . .' " 398 U.S. at 253, 354.

The Court's conclusion that the failure of the Company to demonstrate irreparable injury was a sufficient basis for denying an injunction, is not only supported by *Boys Markets* but by every other Court of Appeals' decision which has considered this issue. See *Detroit Newspaper Publishers Ass'n.* v. *Detroit Typographical Union 18,* 471 F.2d 872 (6th Cir. 1972) cert. denied, 411 U.S. 967 (1973); *North American Coal Corp.* v. *Local 2262,* 497 F.2d 459 (6th Cir. 1974); *Pittsburgh Newspaper Printing Pressmen's Union No. 9* v. *Pittsburgh Press Co.,* 479 F.2d 607 (3rd Cir. 1973).

It stretches the limits of rational thought to understand the Company's basis for its application, i.e., that the suspensions disrupted its operations, when all it needed to do

to have a full work force and normal operations was to allow its employees to work, as they desired to do. However, as the Court of Appeals properly determined, the Company must live with the consequences of its action and may not secure the drastic remedy of a federal court injunction to enforce a work rule.

Contrary to the Company's position, the decision of the Court of Appeals will promote the intentions of *Boys Markets* by inducing employers to utilize the arbitration process rather than to engage in self-help.

The record makes clear that the Union was at all times willing to arbitrate the tank-top dispute, and such a course of action would fully dispose of this tempest in a "very small teapot".

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

I. Philip Sipser
Attorney for Respondents

Of Counsel:

Sipser, Weinstock, Harper & Dorn

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1633

ANHEUSER–BUSCH, INC.,

Petitioner,

v.

TEAMSTERS LOCAL NO. 633,
NATIONAL CONFERENCE OF BREWERY
AND SOFT DRINK WORKERS, SOCRATES MAKRIS,
STEVEN J. McCULLOUGH, FRANK SEBAN,

Respondents.

BRIEF OF AMICUS CURIAE UNITED STATES BREWERS ASSOCIATION, INC. IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

INTEREST OF THE AMICUS CURIAE*

The United States Brewers Association, Inc., the oldest incorporated trade association in North America, is an association of brewer members whose production represents over 90 percent of all malt beverages manufactured in the United States. The Association membership

*This brief is filed with the written consent of all parties pursuant to Supreme Court Rule 42(1).

also includes the major suppliers of the brewing industry, such as bottle and can manufacturers, maltsters and manufacturers of brewery equipment and machinery.

This brief *amicus curiae* supports the position of the petitioner urging the Court to review the decision of the Court of Appeals for the First Circuit. The interest of the *amicus* is predicated upon the far-reaching significance of this case which will profoundly affect the continuing validity of the premise that "the basic policy of national labor legislation (is) to promote the arbitral process as a substitute for economic warfare." *Local 174, Teamsters v. Lucas Flour Co.*, 369 U.S. 95.105 (1962). That precept will be dangerously eroded if the Court permits the decision below to stand. *Boys Markets v. Retail Clerks Union*, 398 U.S. 235 (1970), allows injunctive relief when a union engages in concerted interference with operations in direct abrogation of its no-strike commitment pending arbitration of a contractually-authorized work rule.

The importance or the intrinsic significance of the work rule that gave rise to the dispute is not an issue in this litigation. The Court of Appeals' droll comment that "(t)his tempest has been brewed in a very small teapot" is a facile but misleading characterization of the real issue submitted to it for decision. The present case will determine whether, pending the outcome of the arbitration process, management will retain the right to effectively direct the manner in which production will be carried out in its plant. In fact, the Court of Appeals' opinion has turned the "teapot" into a "Pandora's box" which has the potential of severely disrupting the constructive evolution of the nation's labor relations policy.

For this reason the case is a critical one warranting a presentation of our Association's view.

I. National Labor Policy Recognizes that Management Has and Must Retain the Right to Establish and to Enforce Reasonable Plant Rules Not Inconsistent with the Law or the Collective Bargaining Agreement.

Management has the fundamental responsibility of running its business efficiently and profitably. The consequences of unprofitable and inefficient operations are fatal to the economic interest of both management and labor. The right to manage includes the corollary prerogative to establish reasonable plant rules not inconsistent with law or the collective bargaining agreement. In *United Steelworkers of America v. Warrior and Gulf Navigation Company*, 363 U.S. 574 (1960), the Court expressed the modern view of management's rights with respect to the collective bargaining agreement:

> "Collective bargaining agreements regulate or restrict the exercise of management functions; they do not oust management from the performance of them. Management hires and fires, pays and promotes, supervises and plans. *Id.* at 583; Cf. *Local 1098, Street, Elec. Ry. & Motor Coach Employees v. Eastern Greyhound Lines,* 48 CCH LC ¶18,633 (D.D.C. 1963).

Similarly, arbitrators have consistently held that Management retains all named rights of management not given direct or ceded by the terms of the Collective Bargaining Agreement. *Owens-Illinois Inc.*, 70-2 CCH - ARB ¶8606 (Stouffer, Arb. 1970). If managements right to manage is unenforceable, then that right may as well not exist.

All collective bargaining agreements of our brewer members contain broad "no strike" clauses and equally broad "grievance-arbitration" procedures similar to those at issue in this case. That is, the employer is obligated to arbitrate in return for union's promise not to strike or otherwise disrupt production. *Local 174, Teamsters v. Lucas Flour Co., supra.* These provisions are intended to ensure that production continues even when an employee is given an order he feels is unfair, discriminatory, or in violation of the agreement. The employee may challenge the employer's order through the grievance procedure established by the collective bargaining agreement, but not through self-help. By agreement, it is the arbitrator, not the employee, who is to determine the contractual validity of the employer's order or rule. Pending arbitration, the employee must obey the order or rule unless it presents an objective threat to his health or safety.[1] *Cf. Gateway Coal v. United Mine Workers,* 414 U.S. 368 (1974).

The continuing application of this principle has recently been illustrated in circumstances similar to those presently before the Court. An employer unilaterally posted a work rule requiring employees to wear white tee shirts under their uniform shirts during the summer, and the employees responded by refusing to obey rather than by filing a grievance. The arbitrator upheld disciplinary suspensions, saying:

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[1] The pleadings and court decisions in this controversy have shown no such threat to an employee's health or safety.

> "The grievant's self-help response to the work rule was not justified by any threat to his health or safety, and cannot be condoned. While the work rule must itself fail as being unreasonably overbroad, the insubordination of the grievant prevents his recovery of the wages lost." *City of Janesville*, 64 LA 783, 787 (Schurke, Arbitrator)

Arbitration in the brewing industry, as in others, is hardly immediate. It is not uncommon for three months or more to elapse between the time a grievance is filed and the arbitrator's final decision. If an employee is permitted to ignore an order or rule pending arbitration, management's right to direct its enterprise will be frustrated for several months. The prejudicial effects of the delay in implementing a work rule may be compounded by the fact that the employer's need for the work rule may have passed by the time its right to implement it has been approved by an arbitrator. For example, disputes often arise over the question of whether an employer has the right under the collective bargaining agreement to require his employees to work overtime. Under the reasoning of the Court of Appeals' decision, the employees could refuse to accept overtime assignments pending arbitration of the dispute. However, if the employer's interpretation ultimately prevails, he will have lost many days of production to which he was entitled under the contract.

The District Court recognized that Anheuser-Busch's fundamental right to manage was being threatened by the concerted employee disregard of a company work rules pending arbitration, and enjoined this conduct. As the Court noted in *Boys Markets v. Retail Clerks Union, supra,* an injunction was necessary because no other remedy would suffice:

> "Any incentive for employers to enter into such an arrangement is necessarily dissipated if the principal and most expeditious method by which the no-strike obligation can be enforced is eliminated. While it is of course true, as respondent contends, that other avenues of redress, such as an action for damages, would remain open to an aggrieved employer, an award of damages after a dispute has been settled is no substitute for an immediate halt to an illegal strike. Furthermore, an action for damages prosecuted during or after a labor dispute would only tend to aggravate industrial strife and delay an early resolution of the difficulties between employer and union." *Id.* at 248 (footnote omitted).

If the Court of Appeals' decision is permitted to stand, management will be deprived of the right, which it has not bargained away, to effectively direct the manner in which production will be carried out in its plant.

The decision of the Court of Appeals violates the basic national labor policy that substantive terms and conditions of employment shall be left to private negotiations by effectively incorporating in every collective bargaining agreement a provision that the employer must receive the union's consent before changing a company work rule. Our nation's evolving labor relations law has provided a framework for collective bargaining. The National Labor Relations

Board, under the Taft-Hartley Act, enforces the fundamental right to organize and the duty to bargain. This process has created a body of decisional law which requires employers to negotiate upon mandatory subjects and regulates the manner in which negotiations are conducted. But the NLRB and the courts have continually refused to dictate the substantive provisions of the collective bargaining agreement. See generally, A. Cox, *Law and the National Labor Policy* (1960). In 1947, Congress recognized the temptation for the NLRB to "seek to control more and more of the terms of collective bargaining agreements," and so amended Section 8(d) to provide:

> "For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, *but such obligation does not compel either party to agree to a proposal or require the making of a concession,*" 29 U.S.C. 158(d). (Emphasis Added) *See* H.R. Rep. No. 245, 80th Cong., 1st Sess., 20 (1947)

Recently the Court reaffirmed the vitality of this provision in *H.K. Porter Co., Inc. v. National Labor Relations Board,* 397 U.S. 99 (1969):

> ". . . [W]e hold that while the Board does have power under the National Labor Relations Act, 61 Stat. 136, as amended, to require employers and employees to negotiate, it is without power to compel a company or a union to agree to any

substantive contractual provision of a collective bargaining agreement." *Id.* at 102.

And yet, the Court of Appeals has in effect imposed upon the employer an obligation to refrain from making and enforcing any work rules pending arbitration in virtually every situation. The vast majority of Brewers and other unionized employers proceed from the assumption that the employer has the reserved right to unilaterally implement changes in the company's work rules. By contract, the union has the right to challenge the reasonableness of the rule or its application through the grievance and arbitration procedure. A provision requiring the employer to obtain the union's consent before changing a company work rule, commonly known as a "status quo" clause, is found in a small minority of collective bargaining agreements. A study by the Bureau of National Affairs disclosed that approximately 2 percent of the contracts surveyed contained provisions that mention changes in the company work rules and required the union's prior consent. Bureau of National Affairs, *Basic Patterns in Union Contracts*, 1975, p. 95:7.

Indeed, in the contract underlying the dispute at issue in this case, the employer and union have agreed to a limited "status quo" clause relating to the discipline of shop stewards. *See,* Collective Bargaining Agreement, Article 5, Section 2. Obviously, this is a subject either party may broach in collective bargaining. If a union seeks the right to require its approval of management's rules before implementation, it should bargain for this right. It should be emphasized that by including a limited "status quo" clause relating to steward discipline, the union recognized a particular

need and through the bargaining process limited management's rights to unilaterally impose discipline with regard to stewards. The effect of the Court of Appeals' decision is to modify the party's agreement by expanding the "status quo" clause from the narrow area of steward discipline to cover virtually all changes in working conditions. This is clearly contrary to the proper role of the judiciary in the collective bargaining process.

The Court must not allow the Court of Appeals decision to circumvent the collective bargaining process and deprive management of its fundamental right to establish reasonable plant rules not inconsistent with the law or the collective bargaining agreement.

II. The Decision of the Court of Appeals Seriously Undermines the Holding of *Boys Markets v. Retail Clerks* and Must Not be Allowed to Stand.

The Court, in a series of decisions starting with *Textile Workers v. Lincoln Mills*, 353 U.S. 448 (1957), through *Boys Markets v. Retail Clerks Union, supra,* and *Gateway Coal Co. v. United Mine Workers, supra,* has achieved and maintained a delicate balance between the interests of management and labor by modifying the type and use of economic weapons available to parties in a labor dispute. The Court in *Boys Markets* recognized that the only practical way to carry out a promise not to strike is not to strike, and the only practical way to enforce the promise is through an injunction. The no-strike clause encompasses

not only formal work stoppages, but also concerted interference with normal operations. The decision of the Court of Appeals circumscribes the Court's holding in *Boys Markets v. Retail Clerks Union, supra,* by restricting use of a court injunction to concerted activity constituting a formal strike – a restriction inconsistent with the Court's opinion in *Boys Markets*:

> "... the very purpose of arbitration procedures is to provide a mechanism for the expeditious settlement of industrial disputes *without resort to strikes, lockouts, or other self-help measures.* This basic purpose is obviously largely undercut if there is no immediate, effective remedy for those very tactics that arbitration is designed to obviate." *Id.* at 249. (Emphasis Added)

There is a serious question whether under the applicable collective bargaining agreement the employer is permitted to initiate a grievance proceeding. Cf. *Ed Friedrick v. I.U.E.*, ____ F.2d ____, 89 LRRM 2847 (5th Cir., 1975). But assuming *arguendo* that an employer may have the right to file a grievance over employee disobedience of a work rule, the necessity for an injunction in cases where employees engage in a concerted refusal to obey a work rule remains. In fact, in *Boys Markets, supra,* access to arbitration procedures was equally available to both sides. *Id.* at 239. It is not clear in that case if the employer took formal steps to initiate grievance proceedings; however, the Court's opinion did not hold or intimate that the availability of the grievance procedure to the employer would be a reason for withholding an injunction.[2] There is no relation

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[2]Indeed, some courts considered mutuality of access to the grievance procedure a prerequisite to a *Boys Market* injunction. *Avco Corp. v. Local 787, UAW,* 325 F. Supp. 588 (M.D. Pa. 1971) rev'd 459 F.2d 968 (3d Cir. 1972).

between employer access to the grievance procedure and the propriety of an injunction prohibiting self-help pending arbitration. Even if the employer could and did initiate grievance proceedings, the underlying issue in this case would not be resolved: whether the employees may engage in concerted disobedience of a work rule pending arbitration.

The First Circuit was of the opinion that the closing of the plant was self-inflicted. In fact, the employer had no practical alternative to the course of action it adopted short of suspending the work rule. Arbitrators have held that disciplinary demotions, transfers, withholding of benefits, and forcing public apologies are improper forms of discipline. *See*, e.g., *Thompson Bros. Boat Mfg. Co.*, 55 LA 69, 72-73 (Moberly, Arb., 1970); *Parkside Manor*, 53 LA 411 (Belcher, Arb., 1969); *Celotex Corp.*, 36 LA 517 (Dworkin, Arb., 1961). As the record in this case indicates, warnings proved ineffective and discharge would have been even more severe. Additionally, imposition of the discipline under these circumstances cannot be construed as a lockout. Indeed, the record below is devoid of any contention that management had engaged in a lockout.

It is the position of the United States Brewers Association that the Court of Appeals decision encourages precisely what the Court sought to avoid in *Boys Markets*. If the Court of Appeals decision is permitted to stand, it will subvert the balance created in *Boys Markets*, by rewarding inventive, but equally disruptive, alternatives to a formal strike, and will frustrate the peaceful settlement of labor disputes so carefully pursued by the Court.

CONCLUSION

For the reasons stated herein, as well as for those stated by petitioner, the United States Brewers Association prays the Court to grant the Petition for a Writ of Certiorari and to reverse the decision of the Court below.

Respectfully submitted,

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